Filed 7/31/09 LaPlante v. WCAB (Wal-Mart Stores) CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SANDRA JILL LaPLANTE, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and WAL-MART STORES, INC., Respondents.	F054923 (WCAB Nos. FRE0197989 & FRE0200410) **O P I N I O N**

THE COURT*

ORIGINAL PROCEEDINGS; petition for writ of review from a decision of the Workers' Compensation Appeals Board. Neil P. Sullivan, Deputy, and Ronnie G. Caplane and Alfonso J. Moresi, Commissioners. Dominic E. Marcelli, Workers' Compensation Administrative Law Judge.

Mariani-Pitalo & Pitalo, Elizabeth E. Mariani-Pitalo and J. Michael Pitalo, for Petitioner.

No appearance by Respondent, Workers' Compensation Appeals Board.

Parker, Kern, Nard & Wenzel, David H. Parker, for Respondent, Wal-Mart Stores, Inc.

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* Vartabedian, Acting P.J., Dawson, J., and Kane, J.

Sandra Jill LaPlante petitions for a writ of review from a decision of the Workers' Compensation Appeals Board (WCAB). (Lab. Code, § 5950;[1] Cal. Rules of Court, rule 8.495). LaPlante contends the WCAB erred in concluding *Wilkinson v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 491 (*Wilkinson*) is no longer controlling precedent so as to find her specific and cumulative trauma injuries that became permanent and stationary at the same time, while working for the same employer, must be rated as two separate injuries. Agreeing with the WCAB and First Appellate District's reasoning in *Benson v. Workers' Compensation Appeals Bd.* (2009) 170 Cal.App.4th 1535, we will deny the petition for writ of review.

BACKGROUND

LaPlante filed two claims for industrial injuries while working as a pet department manager for Wal-Mart Stores, Inc. (Wal-Mart) in Hanford. In the first claim, LaPlante alleged a specific injury caused by lifting 50-pound sacks of dog food on April 13, 1999, and in the second claim, that she suffered a cumulative trauma from repetitive duties through the period ending March 19, 2001. Wal-Mart admitted the injuries were industrially related causing specific injury to her right lower extremity, right knee, right elbow, right ankle, and psyche in the first claim and cumulative trauma to her right knee, psyche, and right lower extremity in the second claim.

Following hearings in July and August 2007, the parties submitted the issues of permanent disability, apportionment, need for further medical treatment, and attorney fees to a workers' compensation administrative law judge (WCJ). In November 2007, the WCJ issued a joint findings and award concluding LaPlante was 78 percent permanently disabled from both injuries rated together amounting to $114,655 paid over 498.50 weeks, that she was entitled to further medical treatment to cure or relieve from the effects of the injuries, and that the level of disability warranted a life pension under

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[1] Further statutory references are to the Labor Code.

section 4659. Several weeks later, the WCJ amended the award by recalculating and commuting attorney fees from LaPlante's life pension.

Wal-Mart petitioned the WCAB for reconsideration disputing the WCJ's application of the Supreme Court's decision in *Wilkinson* by rating the successive injuries that became permanent and stationary at the same time as a single injury. Reasoning that medical evidence supported a finding that LaPlante's injuries became permanent and stationary at the same time and disagreeing with Wal-Mart's contention that recent legislation overruled *Wilkinson*, the WCJ issued a report recommending the WCAB deny reconsideration. During that same week, however, the WCAB issued an en banc decision[2] in *Benson v. The Permanent Medical Group* (2007) 72 Cal.Comp.Cases 1620 concluding *Wilkinson* is generally no longer controlling now that apportionment must be based on causation pursuant the legislative changes enacted as part of Senate Bill No. 899. (Stats 2004, ch. 34.) Accordingly, the WCAB subsequently rescinded LaPlante's 78 percent permanent disability award and remanded the matter to the WCJ to rate her injuries separately, with instructions to reopen development of the medical record if necessary.

DISCUSSION

LaPlante contends her work-related injuries resulted in simultaneous and concurrent permanent disability that should be rated as a single injury as the Supreme Court established under *Wilkinson*. LaPlante believes that the revised Labor Code provisions, which do not expressly repeal *Wilkinson*, "should not be applied to artificially separate concurrent permanent disability from concurrent injuries." Wal-Mart argues the petition for writ of review is prematurely taken from an interim order because the WCAB remanded the matter to the WCJ to recalculate LaPlante's award, but here we conclude

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[2] Unlike WCAB three-member panel decisions, en banc decisions carry the weight of "legal precedent under the principle of stare decisis" on all WCJs and WCAB panels. (Cal. Code Regs., tit. 8, § 10341; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6; see Gov. Code, § 11425.60.)

the WCAB conclusively determined a critical issue fundamental to her entitlement to benefits appropriate for appellate review. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1073-1075.)

Although factual issues exist in LaPlante's overall workers' compensation claim regarding the level of permanent disability sustained by her industrial injuries, she specifically asks this court whether the method of assessing permanent disability set forth under *Wilkinson* applies following the 2004 legislative changes. LaPlante therefore presents a legal question subject to de novo appellate review. (*Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal.App.4th 346, 352.) While the WCAB's factual determinations must be affirmed if supported by substantial evidence, "[q]uestions of statutory interpretation are, of course, for this court to decide." (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993)16 Cal.App.4th 227, 233.)

In reviewing legal determinations of the WCAB, "we apply the well-established principle that contemporaneous administrative construction of a statute by the agency charged with its enforcement and interpretation, while not necessarily controlling, is of great weight; and courts will not depart from such construction unless it is clearly erroneous or unauthorized." (*Industrial Indemnity Co. v. Workers' Compensation Appeals Bd.* (1985) 165 Cal.App.3d 633, 638; see also *Honeywell v. Workers' Comp. Appeals Bd.* (2005) 35 Cal.4th 24, 34.) "While the WCAB's interpretation of the provisions of the Labor Code is entitled to respect, 'if it is wrong, it is wrong, and we are not bound by it.' " (*Sierra Pacific Industries v. Workers' Compensation Appeals Bd.* (2006) 140 Cal.App.4th 1498, 1505.) Similarly, "because there is no 'horizontal stare decisis' within the Courts of Appeal, intermediate appellate court precedent that might be binding on [the WCAB] is not absolutely binding on a different panel of the appellate court." (*Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409.)

As this court has summarized, " 'Apportionment is the process employed by the [WCAB] to segregate the residuals of an industrial injury from those attributable to other

industrial injuries, or to nonindustrial factors, in order to fairly allocate the legal responsibility.' " (*Marsh v. Workers' Comp Appeals Bd*. (2005) 130 Cal.App.4th 906, 911 (*Marsh*).) Before the enactment of the 2004 omnibus workers' compensation reforms included in Senate Bill No. 899, "apportionment was 'concerned with the disability, not its cause or pathology.' " (*Marsh, supra,* at p. 912.) After the Legislature repealed former apportionment provisions under sections 4663, 4750, and 4750.5[3] and enacted new sections 4663 and 4664, apportionment today is "based on causation." (§ 4663, subd. (a).) "The plain reading of 'causation' in this context is causation *of the permanent disability*." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 [en banc].) " '[P]ermanent disability is understood as "the irreversible residual of an injury." ' " (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320 (*Brodie*).)

"An employer is now only 'liable for the percentage of permanent disability *directly* caused by the injury arising out of and occurring in the course of employment.' (§ 4664, subd. (a), emphasis added.)" (*Marsh, supra,* at p. 912.) Examining physicians therefore must "make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries." (§ 4663, subd. (c).) Because the statutory table used to convert a permanent disability rating into dollars establishes a sliding scale that more generously compensates increasingly severe disabilities, a single permanent disability rating awards greater compensation than two injuries rated

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3 Sections 4663 and 4750 applied to antecedent injuries, while section 4750.5 applied to subsequent injuries. (*Marsh, supra,* at p. 912, citing *Fresno Unified School Dist. v. Workers' Comp. Appeals Bd.* (2000) 84 Cal.App.4th 1295, 1305.)

separately with the same level of total disability.[4] (§ 4858; *Brodie, supra* 40 Cal.4th at pp. 1321-1322.)

In *Wilkinson,* the Supreme Court held that "whenever a worker…sustains successive injuries to the same part of his body and these injuries become permanent at the same time, the worker is entitled to an award based on the combined disability." (*Wilkinson, supra,* 19 Cal.3d at p. 494.) "This doctrine arose in response to the requirement, set forth in former 4750, that an employer could only be held liable for compensation to an injured worker, who suffered from a *previous* permanent disability or physical impairment, for the disability arising out of the immediate industrial injury." (*Benson, supra,* 72 Cal.Comp.Cases at p 1625, italics added.[5]) The *Wilkinson* court concluded that when two separate work-related injuries become permanent and stationary at the same time, neither permanent disability is previous to the other and the employee therefore is entitled to a single permanent disability rating. (*Wilkinson, supra,* 19 Cal.3d at pp. 497.)

The WCAB majority held in *Benson* that the *Wilkinson* doctrine allowing combined awards of permanent disability in successive injury cases is inconsistent with the requirement contained in Sen. Bill No. 899 that apportionment be based on causation

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4 For example, rating the same employee with two separate 31percent permanent disability ratings results in $49,210 in combined compensation, while a single 62 percent permanent disability rating awards $67,016.25. (*Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1540.) The disparity is even greater where, as in LaPlante's circumstances, a permanent disability rated jointly, but not separately, exceeds 70 percent because of an additional life-pension benefit. (§ 4659.)

5 Repealed by Sen. Bill No. 899, section 4750 previously provided: "An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment. [¶] The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed."

rather than disability. "Here, the actual language of sections 4663 and 4664, subdivision (b), is not reasonably susceptible to more than one interpretation. The language unambiguously mandates apportionment to causation of disability in all cases, including successive industrial injuries to the same body part that become permanent and stationary at the same time." (*Benson, supra*, 72 Cal.Comp.Cases at p 1629.)

After LaPlante petitioned this court for review, the First Appellate District affirmed the WCAB's reasoning in *Benson* and concluded "[t]he clear change in the statutory language indicates intent to invalidate *Wilkinson*." (*Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1550, review den. April 29, 2009.) Agreeing with the WCAB's en banc decision, the court relied on the overall statutory scheme, the repeal of former section 4750 upon which *Wilkinson* was established, and the express mandate under new section 4663, subdivision (c) that " 'specifically requires a physician to determine what percentage of disability *was caused by each industrial injury,* regardless of whether any particular industrial injury occurred before or after any other particular industrial injury or injuries.' " (*Benson, supra*, 170 Cal.App.4th at p. 1552.) The court disagreed with the injured worker that the lack of an express legislative declaration repealing *Wilkinson* constituted sufficient grounds to retain its holding (cf. *Brodie, supra,* 40 Cal.4th at p. 1325) or that anything in the legislative history contemplated preserving *Wilkinson*. (*Benson, supra*, at pp. 1553-1558.) The court also acknowledged that the WCAB's "conclusion, that Senate Bill No. 899 superseded the *Wilkinson* doctrine, is not clearly erroneous and is entitled to deference." (*Benson, supra,* at p. 1558.)

We too, agree with the reasoning of the WCAB and First Appellate District and conclude *Wilkinson* is inconsistent with the apportionment reforms enacted by Sen. Bill No. 899 that now require the WCAB to apportion to the *cause* of disability for each industrial injury. Absent an ambiguity in the statutory scheme, we may not rely on section 3202's directive to construe the workers' compensation laws liberally towards

extending benefits to the injured worker. (*Brodie*, *supra*, 40 Cal.4th at p. 1332.) While the legislative policy undoubtedly treats LaPlante less favorably than if she had sustained a single injury with the same level of disability, "we interpret the law; we do not write it." (*Barr v. Workers' Comp. Appeals Bd.* (2008) 164 Cal.App.4th 173, 178.)

DISPOSITION[6]

The petition for writ of review is denied. This opinion is final forthwith as to this court.

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6 The request of the California Applicants' Attorney Association to file an amicus brief is denied as moot.